Guideline Sentencing Update

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Criminal History

Career Offender Provision

Supreme Court resolves circuit split, holds that "maximum term authorized" for career offender guideline calculation includes statutory enhancements. In 28 U.S.C. § 994(h), the Sentencing Commission was directed to "assure that the guidelines specify a sentence to a term of imprisonment at or near the maximum term authorized" for a career offender. Amendment 506 (Nov. 1,1994) redefined USSG § 4B1.1's "Offense Statutory Maximum" as "not including any increase in that maximum term under a sentencing enhancement provision that applies because of the defendant's prior criminal record." The appellate courts split on whether Amendment 506 conflicted with the mandate of § 994(h) or was a reasonable interpretation of the statute. *See Outline* at IV.B.3.

The Supreme Court has now resolved the split by "conclud[ing] that the Commission's interpretation is inconsistent with § 994(h)'s plain language, and . . . that 'maximum term authorized' must be read to include all applicable statutory sentencing enhancements." Rejecting arguments that § 994(h) was ambiguous, the Court found "that the word 'maximum' most naturally connotes the 'greatest quantity or value attainable in a given case.'" Furthermore, "the phrase 'term authorized' refers not to the period of incarceration specified by the Guidelines, but to that permitted by the applicable sentencing statutes. Accordingly, the phrase 'maximum term authorized' should be construed as requiring the 'highest' or 'greatest' sentence allowed by statute. . . . Where Congress has enacted a base penalty for first-time offenders or nonqualifying repeat offenders, and an enhanced penalty for qualifying repeat offenders, the 'maximum term authorized' for the qualifying repeat offenders is the enhanced, not the base, term."

U.S. v. LaBonte, 117 S. Ct. 1673, 1675–78 (1997) (Breyer, Stevens, and Ginsburg, JJ., dissenting).

See *Outline* at IV.B.3

Departures

Extent of Departure

Seventh and Ninth Circuits differ on whether they may require use of analogies to Guidelines in setting extent of departure after *Koon*. In the Seventh Circuit case, the appellate court held that the district court chose an inappropriate analogy for an upward departure, and that therefore the extent of the departure was unreasonable. In so doing, the court also ruled that *Koon v. U.S.*, 116 S. Ct. 2035 (1996), did not remove the circuit's requirement to explain the extent of a departure by analogy to the Guidelines. "[I]n computing the degree of an upward departure, the district court is 'required to articulate the specific factors justifying the extent of [the] departure and to adjust the defendant's sentence by utilizing an incremental process that quantifies the impact of the factors considered by the court on the . . . sentence.'"

"We do not read *Koon* to require that we abdicate our reviewing authority over the magnitude of a departure chosen by the district court. As noted at the outset, our authority to review the district judge's departure decision in Horton's case stems from section 3742(e)–(f), which provides for appellate review of the reasonableness of the extent of any departure assigned by the district court, an issue quite separate from the court's decision whether to depart at all. Although *Koon* changed the standard of review with respect to the latter issue, . . . and adopted a unitary abuse of discretion standard for the review of departure decisions, . . . we do not believe that it subverted our rationale for requiring a district court to explain its reasons for assigning a departure of a particular magnitude in a manner that is susceptible to rational review. . . . Because this requirement does not deprive the district judge of the deference to which he is due, we do not believe it to be inconsistent with *Koon*."

U.S. v. Horton, 98 F.3d 313, 319 (7th Cir. 1996) (Evans, J., dissenting). *See also U.S. v. Barajas-Nunez*, 91 F.3d 826, 834 (6th Cir. 1996) ("Although *Koon* has changed the standard of review to an abuse of discretion standard, the rationale for requiring an explanation of reasons for departure and the extent thereof still remains.").

The Ninth Circuit, on the other hand, decided en banc that *Koon* effectively overruled its earlier holding that the extent of departure must be determined by reference to "the structure, standards and policies" of the Guidelines and "be based upon objective criteria drawn from the Sentencing Reform Act and the Guidelines," and that courts "should include a reasoned explanation of the extent of the departure" with reference to these principles. *See U.S. v. Lira-Barraza*, 941 F.2d 745, 747–51 (9th Cir. 1991) (en banc).

"In *Lira-Barraza*, we relied heavily on the Seventh Circuit's decision in *U.S. v. Ferra*, 900 F.2d 1057 (7th Cir. 1990), . . . as support for the proposition that the extent of an upward departure *requires* a comparison to analogous Guideline provisions. . . . In light of *Koon*, we now reject such a mechanistic approach to determining whether the

extent of a district court's departure was unreasonable, and hold that where, as here, a district court sets out findings justifying the magnitude of its decision to depart and extent of departure from the Guidelines, and that explanation cannot be said to be unreasonable, the sentence imposed must be affirmed. . . . As the Supreme Court has repeatedly noted, 'it is not the role of an appellate court to substitute its judgment for that of the sentencing court as to the appropriateness of a particular sentence.' . . . Because the extent of the district court's departure was not unreasonable, we find no abuse of discretion in the sentence imposed." The court did note that "[a]n analysis and explanation by analogy, per *Lira-Barraza*, may still be a useful way for the district court to determine and explain the extent of departure, but it is not essential."

U.S. v. Sablan, 114 F.3d 913, 916–19 & n.10 (9th Cir. 1997) (en banc) (five judges dissenting), *rev'g* 90 F.3d 362. *See also U.S. v. Hardy*, 99 F.3d 1242, 1253 (1st Cir. 1996) (affirming upward departure: "A sentencing court is not required to 'dissect its departure decision, explaining in mathematical or pseudo-mathematical terms each microscopic choice made.' . . . Similarly, the reasonableness *vel non* of the degree of departure need 'not [] be determined by rigid adherence to a particular mechanistic formula, but by an evaluation of "the overall aggregate of known circumstances."'").

See *Outline* at VI.D and X.A.1

Mitigating Circumstances

First Circuit holds that third-party job loss cannot be categorically excluded as potential basis for departure. Defendants, owners of a small business, were convicted of tax evasion. The district court denied their request for a downward departure on the claim that "twelve innocent employees will lose their jobs and suffer severe hardship" if defendants are imprisoned. The court agreed that the business would fail and the employees would lose their jobs, but concluded that, as a matter of law, the Sentencing Commission had considered the possible failure of a small business and its effect on employees. On defendants' appeal, the government argued that departure is precluded by §5H1.2, which states that "vocational skills are not ordinarily relevant" in a departure decision.

The appellate court, following *Koon v. U.S.*, 116 S. Ct. 2035 (1996), reversed. "It is clear that the Guidelines do not explicitly list the factor at issue here among the forbidden or the discouraged factors. The question is whether the Commission's 'vocational skills' comment implicitly discourages consideration of job loss to innocent employees. We note first that 'vocational skills' themselves are not a forbidden factor, but a discouraged factor. . . . Therefore, even if the present case merely concerned vocational skills, a per se approach would be inappropriate and the district court would still have to consider whether the case was in some way 'different from the ordinary case where the factor is present.' *Koon*, . . . 116 S. Ct. at 2045."

"We do not agree with the Government's contention that the loss of employment to innocent employees necessarily falls within the term 'vocational skills.' That a defendant may have vocational skills of great value or rarity does not necessarily tell one whether incarceration of that defendant will entail job loss to others totally uninvolved in the defendant's crimes. Vocational skills may or may not be related to job loss to others."

The court found support in *Koon* for its "belief that courts should be careful not to construe the categories covered by the Guidelines' factors too broadly." In *Koon*, "the Supreme Court recognized that while 'socio-economic status' of the defendant is an impermissible ground for departure and 'a defendant's career may relate to his or her socio-economic status, . . . the link is not so close as to justify categorical exclusion of the effect of conviction on a career. Although an impermissible factor need not be invoked by name to be rejected, socio-economic status and job loss are not the semantic or practical equivalents of each other.' . . . 116 S. Ct. at 2051."

"As *Koon* holds that job loss by the defendant resulting from his incarceration cannot be categorically excluded from consideration, we think it follows that job loss to innocent employees resulting from incarceration of a defendant may not be categorically excluded from consideration. . . . To add a judicial gloss equating job loss by innocent third parties with 'vocational skills' is to run headlong into the problem of judicial trespass on legislative prerogative against which the Supreme Court warned in *Koon*. We do not travel this path."

The court stressed that "[t]he mere fact that innocent others will themselves be disadvantaged by the defendants' imprisonment is not alone enough to take a case out of the heartland. These issues are matters of degree, involving qualitative and quantitative judgments" that must be made by the district court. "[W]e decide only that there is no categorical barrier to the district court's consideration of a departure—not that a departure would be proper on these facts."

U.S. v. Olbres, 99 F.3d 28, 32–36 & n.12 (1st Cir. 1996).

See *Outline* at VI.C.1.e and X.A.1

Determining the Sentence

"Safety Valve" Provision

Tenth Circuit holds that burden is on defendants to show weapon was not possessed "in connection with the offense," §5C1.2(2); Tenth and D.C. Circuits differ on whether a defendant can be held responsible for a codefendant's possession. In the Tenth Circuit, three defendants were arrested while carrying marijuana in duffel bags from a marijuana patch to their vehicles parked 200

to 300 yards away. A rifle was found in the vehicle belonging to one defendant, who claimed the rifle was only for protection against snakes. All defendants argued that the firearm was not possessed "in connection with the offense" within the meaning of USSG §5C1.2(2), 18 U.S.C. §3553(f)(2). Section 5C1.2 does not define "possess" or "in connection with," so the district court looked to §2D1.1(b)(1) and found it was not "clearly improbable that the weapon was possessed in connection with the offense conduct of conviction." The court thus held that defendants were ineligible for sentencing below the five-year statutory minimum.

The appellate court affirmed the sentences. The district court's findings and the one defendant's admission that he had the gun for protection "establish[ed] proximity of the firearm to the offense," and the court held that "a firearm's proximity and potential to facilitate the offense is enough to prevent application of USSG §5C1.2(2)." The court also rejected the other two defendants' claim that they should not be held accountable for their codefendant's possession of the weapon. "'Offense' for purposes of §5C1.2(2) includes 'the offense of conviction and all relevant conduct.' USSG §5C1.2 comment. (n.3). The commentary in application note 4, read together with §1B1.3, simply acknowledges that individual defendants are accountable for their own conduct and that participants in joint criminal enterprises can be accountable for the foreseeable acts of others that further the joint activity. . . . Blackburn and Hilton knew of the presence of the weapon Hallum brought to the marijuana patch; that it might further their joint activity was reasonably foreseeable."

U.S. v. Hallum, 103 F.3d 87, 89–90 (10th Cir. 1996).

The defendant in the D.C. Circuit pled guilty to a drug conspiracy charge. His brother pled guilty to that charge and two other charges related to his possession of a firearm during the last of the four drug sales in the conspiracy. That sale occurred outside a restaurant and was handled by defendant's brother while he sat in his car, in which he had a gun. Defendant remained inside the restaurant during the entire transaction. Although he otherwise qualified for the safety valve, the district court ruled that, based on either coconspirator liability or constructive possession, he had possessed a firearm in connection with the offense in violation of §5C1.2(2).

The appellate court remanded, holding first that "co-conspirator liability cannot establish possession under the safety valve." The court reasoned that "application note four provides that, '[c]onsistent with §1B1.3 (Relevant Conduct), the term "defendant," as used in subdivision (2), limits the accountability of the defendant to his own conduct and conduct that he aided or abetted, counseled, commanded, induced, procured, or willfully caused.' . . . This language parallels the wording of one of the two principal provisions defining the scope of relevant conduct . . . . Notably absent from application note four, however, is any mention of the other principal provision defining the scope of relevant conduct, which holds defendants liable for 'all reasonably foreseeable acts and omissions of others in furtherance of the jointly undertaken criminal activity.' *Id.* §1B1.3(a)(1)(B). Omission of this co-conspirator liability language, we think, can hardly have been inadvertent. Its omission, moreover, is consistent with the safety valve's basic purpose: to spare certain minor participants in drug trafficking enterprises from mandatory minimum sentences when imposition of the mandatory sentences would be disproportionate to the defendants' culpability. . . . Given the great likelihood that at least one member of a drug distribution conspiracy will possess a firearm, . . . incorporating co-conspirator liability into the safety valve's weapon possession element would render the safety valve virtually useless."

The court recognized "the tension" between Note 4 and "application note three's broad definition of 'offense,' which includes 'all relevant conduct.' . . . Applying the principle that the specific trumps the general, however, we read application note four, which addresses only the weapon possession element, as restricting the meaning of application note three, which applies to several elements of the safety valve. Indeed, application note four describes the weapon possession element's use of the term 'defendant' as 'limiting' defendants' liability, . . . a limitation that would have no function if application note three incorporated co-conspirator liability into the weapon possession element. We also think it significant that, by comparison to the provision enhancing drug sentences for gun possession, which uses the passive voice—requiring enhancement if a firearm 'was possessed,' *id.* §2D1.1(b)(1)—and omits any reference to the defendant, the safety valve speaks in the active voice, requiring that 'the defendant' must do the possessing . . . . And most fundamentally, we think our interpretation of the safety valve is faithful to its purpose."

The court also held that the alternative ground of constructive possession, while a possibly valid ground to deny the safety valve, did not apply under the facts of this case. "[F]inding a participant in a drug operation constructively possessed someone else's weapon requires some additional evidence linking the participant to the weapon—a link nowhere evident in the record before us."

In re Sealed Case, 105 F.3d 1460, 1461–65 (D.C. Cir. 1997).

See *Outline* generally at V.F

Sentencing of Organizations

Determining the Fine

Ninth Circuit holds that court could impose fine that might jeopardize continued viability of organization. Defendant (ELI) pled guilty to eight fraud counts. In addition to restitution of $322,442, the district court imposed a fine of $1.5 million. The fine was a departure from the sentencing guideline range of $6,425,013 to $9,178,590, and was reached after an independent auditor analyzed ELI's finances. ELI appealed, claiming that the fine would jeopardize its continued viability and, pursuant to USSG §8C3.3, a lower fine should have been imposed.

The appellate court held that the fine was properly imposed. In relevant part, §8C3.3(a) states that a court "shall reduce the fine below that otherwise required . . . , to the extent that imposition of such fine would impair its ability to make restitution to victims." Subsection (b) states that a court "may impose a fine below that otherwise required . . . if the court finds that the organization is not able and, even with the use of a reasonable installment schedule, is not likely to become able to pay the minimum fine required." An unnumbered paragraph adds that "the reduction under this subsection shall not be more than necessary to avoid substantially jeopardizing the continued viability of the organization."

The court held that §8C3.3 "does not prohibit a court from imposing a fine that jeopardizes an organization's continued viability. It permits, but does not require, a court in such circumstances and in its discretion, to reduce the fine. The only time a reduction is mandated under section 8C3.3 is if the fine imposed, without reduction, would impair the defendant's ability to make restitution to victims. . . . Thus, even if the district court's fine would completely bankrupt ELI, neither section 8C3.3(a) nor section 8C3.3(b) precluded the court from imposing such a fine so long as the fine did not impair ELI's ability to make restitution. It did not. . . . [Thus], the plain language of Guideline Section 8C3.3 did not require the district court to further reduce ELI's fine."

The court also looked at the guideline covering fines for individuals. "Under Guideline Section 5E1.2(a), a court must first determine if an individual defendant is financially able to pay any fine at all. If the defendant successfully demonstrates that he is unable to pay any fine, then a fine may be inappropriate. . . . Unlike Guideline Section 5E1.2, Guideline Sections 8C3.3 and 8C2.2, which apply to organizational defendants such as ELI, do not require a sentencing court to consider whether the defendant can pay a fine, so long as the ability to pay restitution is not impaired." The court added that the district court properly considered the factors listed in 18 U.S.C. §3572 in setting the fine, and that nothing in that statute precluded a fine that could jeopardize the company's viability.

U.S. v. Eureka Lab., Inc., 103 F.3d 908, 912–14 (9th Cir. 1996).

To be included in *Outline* at section VIII

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